

COMMENTS

Therapeutic jurisprudence: judicial officers and the victim's welfare – *S v M* 2007 (2) SACR 60 (W)

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Introduction

South African judicial officers have adopted, but only to an extent, the concept of restorative justice (A Skelton and M Batley 'Restorative justice: a contemporary South African review' 2008 *Acta Criminologica* 42, 49; cf SS Terblanche *Guide to sentencing in South Africa* (2007) 177 and *S v Maluleke* 2008 (1) SACR 49 (T)). This aims to hold offenders accountable in a meaningful way while addressing the needs of victims and the larger community. Sharing similar principles, but being more comprehensive, the concept of therapeutic jurisprudence, relatively unknown in South Africa, explores a problem solving approach and perceives the law as a potential healing tool, as opposed to simply focusing on guilt or innocence and processing cases (Goldberg *Judging for the 21st century: a problem-solving approach* National Judicial Institute Canada (2005) 5 available at <http://www.nji.ca/nji/Public/documents/Judgingfor21scenturyDe.pdf> accessed on 14/01/08).

Viewing the law through a therapeutic lens, it acknowledges the profound impact (often anti-therapeutic) the legal process and its outcome may have on all participants' lives and well-being. Cases where, inter alia, drugs or alcohol, domestic violence and mental health problems are involved provide opportunities to apply therapeutic jurisprudence principles within the criminal court context, giving rise to the so-called 'problem-solving courts' (Goldberg op cit 6). The focus will typically be on non-custodial sentencing options such as postponed sentences (with conditions) or correctional supervision (DB Wexler 'Robes and rehabilitation: how judges can help offenders 'make good' 2001 *Court Review* 18) and the offender's motivation, treatment and rehabilitation (Wexler 'Therapeutic jurisprudence and readiness for rehabilitation' 2006 *Fla Coastal L Rev* 111); Goldberg op cit 33; A Birgden 'A compulsory drug treatment program for offenders in Australia: therapeutic

jurisprudence implications' 2008 *T Jefferson L Rev* 367). In addition to the offender's well-being, there is a need to also recognise and facilitate the therapeutic needs of specific victims, as will be highlighted below.

This note examines the principles and practice of the therapeutic jurisprudence perspective, including its relationship to restorative justice, and briefly explores the differences between traditional and therapeutic court procedures and judicial officers, as well as the importance of personal skills. It further illustrates how the court's unusual approach towards an adolescent victim in the rape case of *S v M 2007 (2) SACR 60 (W)* sets an example for incorporating therapeutic jurisprudence principles, with regards to victims, into the sentencing court room.

Therapeutic jurisprudence: principles and practice

Therapeutic jurisprudence focuses on 'humanising the law and concerning itself with the human, emotional and psychological side of law and the legal process' (Wexler 'Therapeutic jurisprudence: an overview' Public lecture 29/10/1999 available at <http://www.law.arizona.edu/depts/upr-intj/intj-o.html> accessed on 14/08/08 1), yet, without purporting to be a form of judicial or quasi-judicial therapy or covert paternalism (I Freckleton 'Therapeutic jurisprudence misunderstood and misrepresented: the price and risks of influence' 2008 *T Jefferson L Rev* 595). It follows a problem solving approach, encompassing, inter alia, legal procedure and legal roles (Wexler 1999 op cit 1). Though this note focuses on criminal cases, with regards to legal procedure, custody disputes provide a useful illustration of how a therapeutic jurisprudence approach can focus on more creative and less damaging ways to resolve these issues during divorce proceedings (RG Madden 'From theory to practice: a family systems approach to the law' *T Jefferson L Rev* 449). Such an approach recognises the reality and fragility of ongoing relationships after divorce in that it addresses the children's dilemma when expected to choose between parents while at the same time putting emphasis on one parent's shortcomings.

In exercising his/her legal role in sentencing, a judicial officer's choice of the way in which the matter is handled will influence the attitude of the offender. Better compliance can be attained by clarifying the conditions formulated when correctional supervision is imposed through direct dialogue, as well as by promoting cognitive self-charge when the offender is allowed to make suggestions in this regard to indicate particular weaknesses or harmful patterns that should be addressed (Goldberg op cit 19-23 referring to procedural justice). One judge even follows the practice of writing letters to offenders after being sentenced in his court (Wexler 2006 op cit 115). By devising a questionnaire for mitigation purposes (Wexler 2006 op cit 120-7) legal representatives

not only involve their clients and force them to reflect, but also show an innovative approach to their roles and fact finding during sentencing. Criminal lawyers (and courts) are further reminded of their crucial role with regards to treatment issues (when relevant), and consequent acknowledgement and dependence on psychosocial research, in each case (DB Wexler 'A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice' 2005 *Fla Coastal L Rev* 5–8). Moreover, the above practices signal an ethic of care towards offenders whereby their expectations are met, namely, to be able to present their cases to an attentive tribunal, to have their cases acknowledged and taken into account and to be treated with respect for their rights and for themselves as individuals (Wexler 2006 op cit 113–4).

Using a therapeutic jurisprudence lens, role-players have on occasion also focused on the victim. For example, empirical research showed that some judges have made (informal) orders for therapy to address the impact of the crime on the victims (A van der Merwe 'Addressing victims' harm: the role of impact reports' 2008 *T Jefferson L Rev* 391). Further, a Legal System Victim Impact Statement (LSVIS) is proposed to recognise and determine a victim's experience of the criminal justice system (DB Wexler 'Legal system victim impact statements' in *Rehabilitating Lawyers: Therapeutic Jurisprudence Principles for Criminal Law Practice* (2008) 4).

All types of cases are suitable for the application of these principles, and other values, such as justice and the constitutional rights of the accused, are not compromised (Goldberg op cit 5; King 'Therapeutic jurisprudence, child complainants and the concept of a fair trial' 2008 *Crim LJ* 303). Role players get the opportunity to address real underlying issues in a case. Freckleton (op cit 575), however, cautions against misuse by therapeutic jurisprudence proponents in the name of 'wishing reform or appearing sensitive while the basic tenets of lawyering are not fulfilled'.

In an endeavour to explain the differences between traditional versus therapeutic court procedures and officers, Goldberg (op cit 5) lists the following as representative of a typical traditional approach to court procedures: a focus on the legal outcome; being case orientated and rights-based; accept only the applicable law; being backward-looking and legalistic; compliance to applicable law. In contrast, therapeutic court procedures would embrace a therapeutic outcome; be people orientated; be interests – or needs based; incorporate or rely on social science finding or research; be forward-looking, common-sensical and identify the underlying problem in the legal matter.

S Daicoff ('Growing pains: the integration vs specialization question for therapeutic jurisprudence and other comprehensive law areas' 2008

T Jefferson L Rev 570) rightly points out that such an approach could not naturally be followed by all. The 'lawyer personality' per se tends to shun interpersonal relationships and emotions in their decisions in favour of logic, analysis, rights, duties and obligations. Judicial officers interested in pursuing a more therapeutic jurisprudence approach would be interested in the party as a person, open to communicate and willing to listen to the party (over and above communication with counsel); be perceptive to nuance or sensitive to special needs (such as limited language skills, emotional disturbance and cultural issues); be pro-active, look wider than purely punitive measures, empower others and accept information from other disciplines (Goldberg op cit 5). Some form of training appears to be essential in many instances in order to foster awareness, sensitivity and enhance personal skills such as empathy, respect and active listening (Daicoff op cit 571; Freckleton op cit 583). In addition, Daicoff (op cit 556-60) argues that at least four categories of competencies are relevant for judicial officers, namely intra-personal skills, inter-personal skills, decision-making skills and dispute resolution and judging skills.

Therapeutic jurisprudence versus restorative justice

Therapeutic jurisprudence, together with, inter alia, restorative justice, have been identified as part of a comprehensive law movement. These are vectors or disciplines that emerged since the 1990's in response to dissatisfaction with lawyering and the legal system (Daicoff op cit 553). However, though each being unique and functioning independent, two core common features are shared by all these vectors:

'They all explicitly seek to: (1) optimise human well-being in legal matters, whether that well-being is defined as psychological functioning, harmony, health, reconciliation or moral growth; and (2) focus on more than legal rights, so they include the individual's values, beliefs, morals, ethics, needs, resources, goals, relationships, communities, psychological state of mind, and other concerns in analysis of how to approach the legal matter at hand' (Daicoff op cit 554-5).

Further, therapeutic jurisprudence falls within the category that functions as a lens through which one might view a legal matter – thus, the question is frequently asked as to what is best for the client or party's well-being? On the other hand, restorative justice provides a process (thus another option) for the actual resolution of legal matters or disputes (Daicoff op cit 555). Skelton and Batley (op cit 39, 43-4) highlight that restorative justice processes can find application at the pre-trial, pre-sentence, sentence and post-trial stages. Processes may include diversion, attendance of life skills programmes, victim-offender me-

diation, family-group conferencing, restoration (basic as well as more abstract) and, on occasion, tendering an apology and forgiveness.

Both disciplines have further been associated with healing values (Daicoff Comprehensive Law Movement available at www.comprehensive-lawmovement.com accessed 20/04/09). However, Skelton and Batley (op cit 49) emphasise that restorative justice is a new way of doing justice, either as an alternative or within the criminal justice system, and that the victim is always central while the offender must be held accountable. Considering the therapeutic consequences in formulating, applying or interpreting the law and legal procedures or when fulfilling one's legal role, on the other hand, is simply one category of factors to be taken into account, as appropriate (DB Wexler and BJ Winick (1996) *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* xvii). In addition, therapeutic jurisprudence doesn't claim to be the first to place mental health considerations on the table, but asserts that what is new is the emphasis on the 'human impact of aspects of law and lawyering', the 'reality of outcomes that have a detrimental impact on the community of law's stakeholders' (Freckleton op cit 580), and '... the effort at making the perspective explicit and conceptualizing it as a field of inquiry' (Wexler 1995 'Reflections on the scope of therapeutic jurisprudence' *Psychol Pub Pol'y & L* 236 as referred to by Freckleton op cit 580). Despite therapeutic jurisprudence's growth over 20 years, it has not been without criticism. Freckleton (op cit 583-91) evaluates the main components and then argues that they all stem from misunderstanding the modest aspirations of therapeutic jurisprudence as highlighted above.

The process of restorative justice has been used in some recent reported cases (see for example *S v Shilubane* 2008 (1) SACR 295 (T); *S v Maluleke* supra and *S v Thabethe* [2009] JOL 23082 (T)) and is, inter alia, used at some courts, such as the Hatfield Community Court (having a full-time restorative justice officer at the court premises), but no reference could be found regarding the explicit influence of therapeutic jurisprudence principles. Though, when carefully analysed, some judgments may provide examples of presiding officers who unwittingly apply this approach. The judgment of *S v M* 2007 (2) SACR 60 (W) below is evaluated for this purpose, focusing on the victim's well-being in particular.

S v M 2007 (2) SACR 60 (W)

In *S v M* 2007 (2) SACR 60 (W) the court convicted a stepfather, aged 63, of raping his stepdaughter (N) twice over a four to five month period. She was respectively 14 and 15 years old on the two occasions. Despite his plea of guilty and being a first offender, he was

sentenced in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 to a term of life imprisonment on each count. In addition to the inherent seriousness of the crime as highlighted by previous judgments, the following aggravating factors were taken into account: the age of the victim, the relationship of the accused to the victim and the rape of the child in her own bedroom (para 31). Notwithstanding the court's questionable approach in dealing with the process of whether a finding of substantial and compelling circumstances (s 51(3)(a)) could be made that would justify a lesser sentence than life (S Terblanche 'Sentencing' (2008) *SACJ* 129-39), noteworthy insight was displayed into the difficulties and consequences of making a complaint about sexual abuse within the family. The court consequently followed an unusual approach in addressing issues concerning N's well-being. This note evaluates the role of Satchwell J in this regard and highlights the therapeutic benefits that may result from it.

N never appeared before the sentencing court since the case was referred from the regional court to the high court for sentencing purposes in terms of the divided case procedure that was applicable until the end of 2007 (effected by s 52(1) of the Criminal Law Amendment Act 105 of 1997). The court accepted the expert opinions of both social workers, appearing on behalf of the accused and the state respectively, that it would not be in the best interest of N to appear in court in order to testify before sentencing (para 44). The information thus obtained with regard to N emanates mainly from a report compiled by the social worker, and her subsequent testimony. She performed certain tests on N, as well as counseled and interviewed her (para 43).

N's story

This matter ended up in the criminal justice system after investigations by N's school, social workers and the police. It was all set in motion by an undated letter written by N to one of her school teachers. Satchwell J included a portion of it in her judgment and it reads as follows:

'Ek het hulp nodig, en ek kan nie meer soos 'n harlekyn lewe nie. Ek wou dit al lankal met juffrou deel, maar was bang en het nie geweet hoe om dit met juffrou mee te deel nie... .

Ek is bang daarvoor om in die aande by die huis te wees. Ek maak ook seker dat ek in die middag naskool met naskoolse aktiwiteite besig is, my huiswerk doen en boeke lees. Dit is nie genoeg nie en ek het 'n begeerte om soveel moontlik van die huis weg te wees. Ek gaan draf met my hond en skryf stories, gaan na E se huis toe en help haar met haar werk, maar ek is steeds bang om huis toe te gaan. Alles wat ek doen om my gedagtes weg te kry van die probleem help nie.

Ek soek plekke om weg te kruip vir my stiefpa, maar hy kry dit altyd. Die gevolg is dat ek nie meer wegkruipplek het nie. Ek word al hoe banger vir

hom en hardloop die heelyd agter my suster of my ma aan sodat ek nie alleen saam met hom in 'n vertrek is nie. Hy kry egter altyd 'n manier om my alleen te kry. Daardeer dwing hy my om opstandig te word – wat absoluut nie in my geaardheid is nie – en my ma dink nou dat ek 'n rebel word. Ek verloor deesdae my humeur maklik en raak gou geïrriteerd.

Ek het al baie hieroor gebid en gehuil, selfs slapelose nagte gehad, maar niks het verander nie. Ek het C laat weet, maar nie reguit vir haar gesê dat hy met my lol nie. Ek het indirek daarop ingegaan met die hoop dat sy vir iemand sal sê, maar dit het nie gehelp nie. Daarom het ek besluit om maar te skryf. Dit pla my al lank en weerhou my daarvan om my beste te gee op die vakke waarop ek uitblink.' (para 7)

Disturbing family dynamics

N's mother, after coming from a physically abusive relationship with her daughters' father, married the accused two years prior to the first incident of rape on N. What was particularly disturbing about this case and an issue of concern to both social workers is the response of N's mother to family relationships and the rapes of her daughter by her husband (para 45; para 49). She apparently believed that the school and social worker were to be blamed for the criminal prosecution and the consequent traumatising of the whole family. In her mind these so-called 'professionals' unnecessarily disrupted her family and had set N against her parents – a situation that could have been handled by the family alone.

Despite any evidence that the mother knew what was going on, the court formed the impression that, in the absence of a strong and protective parent, the incidents of rape were 'allowed' and that the family of the mother and two daughters had exchanged the physical abuse of a husband and father for the sexual abuse of a stepfather (para 46). It would appear that N was, in the particular family paradigm and its values, unable to struggle against it or change anything (para 46).

Within the above context, N's mother manipulated her to the extent that she felt burdened with responsibility for the accused's conviction and likely sentence. Apparently, the mother was emotionally dependent on her husband and couldn't properly function without him (para 51). She further facilitated a visit by N to the accused in prison and supervised the process of forgiveness as expected by the Bible (para 52), which, in her view, logically demanded the accused's return to his family. In the light of her mother's attitude, N also expected her stepfather to receive a non-custodial sentence. Yet, the court took notice of the fact that N's expressed forgiveness was not necessarily her free and genuine feeling (para 52) and that N would face continuous victimisation by her mother, if her expectations in terms of the sentence were not met (para 55).

Court order

As upper guardian of N, the court ordered continuing counseling (dispite the mother's instructions to stop it) and made an order for two specific sessions. The first session had to address the disclosure of the two incidents of rape by her step-father which set into motion the investigation of the case and subsequent trial. The social worker had to explain what happened at court and the role of N's evidence. The following message from the judge was to be conveyed to her:

'... she is a brave young women who acted as she should have done by making the report to the school; she has not only ended the abuse of herself but perhaps protected others; her values and sense that she is entitled to the privacy of her body is absolutely correct and that no one is to suggest otherwise; she is not to feel degraded or ashamed in any respect; she remains as 'virginal' as anyone else in both body and soul; she is entitled to feel proud of how she has tackled this very difficult issue.' (para 50)

The second session had to deal with the judgment of the court, as well as provide assistance to N to work through the implications thereof. An explanation of what the sentencing process entails, whose responsibility it is to take the decision and legal reasons to impose life imprisonment can play an essential role in dealing with N's apparent self-blame as well as her mother's anger and rejection. Other important information would deal with the practical implication of life imprisonment for all their lives and with answering questions from the complainant. The court further accepted that it could not protect N from the misguided beliefs and responses of her mother (para 56), yet, in an effort to mediate it, reached out to her in an unusual way. Satchwell J used her standing as a judge to convey a powerful message with healing potential to the complainant. She concluded by highlighting that 'N stands alone in this terrible ordeal' and 'she is scarred for life' (para 116).

Conclusion

The above discussion of *M* illustrates how therapeutic jurisprudence principles (albeit unwittingly in this case) provide an opportunity for judicial officers to look beyond adjudication (with regards to both offender and victim); do more than to just process a case; acknowledge the profound impact (often anti-therapeutic) the legal process and its outcome may have on all participants' lives and well-being; develop an ethic of care and humanise the legal process (Wexler 2005 op cit 3). King ('Therapeutic jurisprudence, criminal law and the plea of guilty' (2008a) in DB Wexler (ed) *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* 238) further asserts that a therapeutic jurisprudence approach (positively) changes the

dynamics of the courtroom, particularly in the context of sentencing, by requiring more active judicial officers and more involved lawyers and offenders. One reason why the therapeutic jurisprudence 'lens' has not been used in an explicit way in South Africa might be that our courts have as a guiding principle the concept of ubuntu which underscores the constitutional recognition and furtherance of the dignity and wholeness of all people. However, since 2004, several international jurisdictions have accepted the perspective of therapeutic jurisprudence by either adopting resolutions (Goldberg *op cit* 39), developing judicial manuals on the topic (*ibid*) or incorporating it into their national curricula for judicial education (King 2008 *op cit* 313). Examples of countries involved are, *inter alia*, the United States of America, Canada and Australia. Perhaps the time is right to consider the formal recognition of therapeutic jurisprudence in South Africa too.